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EDUCATION AND THE DEAD HAND

IT is the policy of our law to encourage gifts for charitable purposes. Included among such purposes are the promotion of education, as well as the relief of poverty, the encouragement of religion, and a somewhat indefinite class of objects which are or may be thought to be beneficial to the public. Such gifts are valid whether made to a charitable corporation for any or all of the purposes for which it was created, or (in all but a very few states) to individual trustees for charitable purposes. It is not necessary that the beneficiaries of a charity should be definite persons; on the contrary, the indefiniteness of the beneficiaries is an essential element in the legal conception of a charity. It is because they are supposed to be beneficial not merely to particular persons but to the public in general, or to some portion of the public, that gifts for charity are favored.

If a testator chooses to leave his property to definite beneficiaries, he cannot control its disposition for more than a generation or two. But a trust for charitable purposes may last forever. By the creation of such a trust, specific property or the beneficial interest in specific property or in a shifting fund or mass, may be rendered forever inalienable, may be forever "taken out of commerce," may be devoted in perpetuity to the accomplishment of the purposes for which the trust was created. One who happens to acquire property during the short span of his lifetime may by giving it for charitable purposes control its disposition throughout the ages.

An extraordinary power this, and one which not unnaturally has excited serious misgivings. Lord Campbell once declared:

"A man has a natural right to enjoy his property during his life, and to leave it to his children at his death, but the liberty to determine how property shall be enjoyed *in saecula saeculorum* when he, who was once the owner of it, is in his grave, and to destine it in perpetuity to any purposes however fantastical, useless, or ludicrous, so that they cannot be said to be directly contrary to religion and morality, is a right and liberty which, I think, cannot be claimed by any natural or Divine law, and which, I think, ought by human law to be strictly watched and regulated." [1]

And indeed some economists, notably M. Turgot,[2] have thought that the very existence of a power to create a perpetual foundation is incompatible with the public weal, and have advocated its complete abolition. It appears to them shocking that a man who has lain in his tomb for centuries should be still controlling the disposition of the property which he once owned, and thereby to some extent controlling the destinies of mankind.

But have not our privately endowed hospitals and churches and libraries been of inestimable value to our people? Have not our privately endowed institutions of learning played a not unworthy part in promoting education and the well-being of the state? Is not the world the better because of John Harvard, Elihu Yale, Ezra Cornell, Matthew Vassar, and the multitude of other founders and benefactors of our endowed colleges and universities? What reader of this REVIEW does not owe a debt, directly or indirectly, to the generosity of Nathan Dane? And have not the generous gifts of the Phillips family been of great value in the field of secondary education? It is true that the public schools and the state universities are playing a most important, a most necessary, part in American education. But the privately endowed institutions also have their *rôle*. It is possible in them to further many objects, to try many experiments, to which it would be improper to devote the public funds, or which the public would be unwilling to support until convinced by proof of their success. We may divorce

[1] Jeffries *v.* Alexander, 8 H. L. C. 594, 648 (1860).

[2] *Encyclopédie*, sub. tit. *Fondations*. See also LOWE, ENDOWMENT OR FREE TRADE (1817); FITCH, "Educational Endowments," Frazer's Magazine, Jan., 1869, p. 11. But see 5 J. S. MILL, DISSERTATIONS, 1–28; KENNY, ENDOWED CHARITIES, 4–27.

the church from the state, but can we dogmatically assert that religion must be absolutely divorced from education? The burden of research in some fields of learning is perhaps too heavy to justify the necessary drain upon the public treasury. The complete separation of education and politics, the freedom from the control of an executive temporarily in office, of a legislature temporarily dominated by one or another of the political parties, has its advantages, as experience has shown.

The real problem, as all but a few extremists would concede, is not whether educational and other charitable endowments should be permitted; but how far the control of the founders should extend, how far it is permissible to depart from the directions of the founders when in the course of time circumstances have so changed as to make it impossible, illegal, or at least inexpedient, strictly to comply with them. It frequently happens that although the provisions made by the founder of a school or college are in accordance with the best standards of the time of its establishment, in course of time standards change and the strict observance of the provisions would destroy the institution or at least retard its development. Is the institution to be forever fettered by such provisions?

The history of the English people is so much longer than our own, that a study of their experience may well prove profitable to us.[3] Centuries have elapsed since many of their educational institutions were founded, centuries in which the progress of society in general and of education in particular has been tremendous. In many cases it has been found imperatively necessary to revise the schemes of the founders, in order to save the institution from decay and death. The most far-seeing of men could not foresee the changes that time has brought to pass.

In the sixteenth century it was the fashion in England among

[3] The whole subject of charitable foundations in England has been thoroughly investigated. As a result of the untiring efforts of Lord Brougham, several parliamentary commissions were appointed, who labored from 1818 to 1837, producing thirty-eight volumes of reports which contain an exhaustive store of information. From time to time other commissions have made reports, *e. g.*, Commission on Popular Education, 1861; Schools Inquiry Commission, 1867–68. Since 1853 there have been annual reports rendered by the permanent Board of Charity Commissioners, created by an act of Parliament in that year; and since 1902 there have been annual reports of the Board of Education, created in 1899, to whom the power of the Charity Commissioners as regards educational endowments was transferred by Orders in Council, 1900–02.

the charitably inclined to establish Grammar Schools, that is, as the term was then used, schools for instruction in Latin and Greek. At the beginning of the nineteenth century some of the more ambitious of the governors and masters of these schools wished to extend the curriculum so as to include writing and arithmetic and modern languages and even physical science. But Lord Eldon, a very great judge, but as conservative a man as ever sat upon the woolsack, held that this could not be done, that the founders had shown their devotion to the classics and that the will of the founders must be respected.[4] Such a doctrine, however, rendered many of the schools practically useless—some of them worse than useless.[5] It could not stand. Lord Eldon's successors had already shown signs of taking a more liberal view than he, holding that the school curriculums might be revised and other changes made,[6] when Parliament, the omnipotent, took a hand. Several statutes were enacted providing a simple method whereby the changes necessary to enable the schools to play their proper part in modern education could be systematically made under the supervision of the courts or of public officials, who should have regard to, but who should not be absolutely bound by, the intentions of the founders and benefactors.[7] Similarly Parliament has empowered the

[4] "The question is, not what are the qualifications most suitable to the rising generation of the place where the charitable foundation subsists, but what are the qualifications intended." A. G. *v.* Whiteley, 11 Ves. 241, 247 (1805). See also A. G. *v.* Earl of Mansfield, 2 Russ. 501 (1826), and cases cited TUDOR, CHARITIES, 4 ed., 631. Lord Eldon was probably historically in error in thinking that the founders of Grammar Schools intended to exclude everything but the classics. 1 REPORT OF COMMISSIONERS ON POPULAR EDUCATION (England), 1861, p. 458. See also 1 REPORT OF SCHOOLS INQUIRY COMMISSION, 1867–68, p. 452.

[5] See REPORT OF COMMISSION ON POPULAR EDUCATION, 1861; REPORTS OF SCHOOLS INQUIRY COMMISSION, 1867–68; the reports of Lord Brougham's commissions; and the annual reports of the Charity Commissioners. And see KENNY, ENDOWED CHARITIES, 52.

As to the evils resulting in course of time from other charitable trusts, see HOBHOUSE, THE DEAD HAND. As to the disastrous consequences of that once popular form of charity known as doles, *i. e.*, the promiscuous distribution of money or goods among the poor, see KENNY, ENDOWED CHARITIES, 40–52. In the case of doles and certain allied forms of charity, Parliament has authorized the application of the funds to education by the Charity Commissioners with the consent of the governing body. Endowed Schools Act, 1869, 32 & 33 Vict. c. 56, § 30.

[6] See A. G. *v.* Gascoigne, 2 Myl. & K. 647 (1832); A. G. *v.* Caius College, 2 Keen, 150 (1837); TUDOR, CHARITIES, 4 ed., 632.

[7] See The Grammar Schools Act, 1840; The Endowed Schools Acts, 1860, 1869, 1873, 1874; The Elementary Education Act, 1870; The Board of Education Act, 1899;

universities of Oxford and Cambridge to make such changes as should be necessary to enable them to awake from the dreams of the Middle Ages and adjust themselves to the needs of modern society.[8]

But in the absence of legislation by an omnipotent Parliament, what can be done? In the law of charitable trusts in England, and in all but a very few states, there prevails a principle called the doctrine of *cy-près*. Under this doctrine when property is given for a particular charitable purpose, and when that purpose becomes impossible of accomplishment, the courts may authorize the application of the property to other charitable purposes, provided these other purposes, as well as the expressed purpose, fall within a more general charitable purpose of the donor. The doctrine also applies when the particular charitable purpose of the donor is or becomes illegal. All this is clear enough. The real difficulties begin to arise when the accomplishment of the particular charitable purpose of the donor is neither impossible nor illegal, but where it would be unwise, where it would be inexpedient, to carry it out. It is generally said by the courts that in such a case no departure from the expressed directions of the donor can be authorized.[9]

But can it be that the disposition of property is placed be-

The Education Act, 1902. Under these acts authority to authorize new schemes was vested in, first, the Endowed Schools Commissioners, later the Charity Commissioners, and now the Board of Education. These acts authorized among other things changes of curriculum and changes as to religious qualifications of governors and masters and pupils. Under the most recent of the Education Acts (9 & 10 GEO. 5, c. 41 (1919)), if the governing body of an educationary institution applies for a Parliamentary grant, provisions in any instrument regulating the trusts or management of the institution which are inconsistent with the conditions prescribed by the Board of Education for the receipt of Parliamentary grants, may be modified.

[8] See Oxford University Acts, 1854–69; Cambridge University Act, 1856; University Tests Abolition Act, 1871; Universities of Oxford and Cambridge Act, 1877. Under the last-named act changes may be authorized by commissioners who "shall have regard to the main design of the founder, except where the same has ceased to be observed before the passing of this Act, or where the trusts, conditions, or directions affecting the emolument have been altered in substance by or under any other Act." See KENNY, ENDOWED CHARITIES, 194.

[9] See, for example, Harvard College *v.* Society for Promoting Theological Education, 3 Gray (Mass.), 280 (1855) (attempt to separate divinity school from Harvard College); Winthrop *v.* A. G., 128 Mass. 258 (1880) (attempt to allow Harvard College to administer funds given to individual trustees to maintain a museum in connection with Harvard College); Harvard College *v.* A. G., 228 Mass. 396, 117 N. E. 903 (1917) (attempt to allow Massachusetts Institute of Technology to co-operate in use of funds given to Harvard College for engineering school).

yond human control? Is there to be no power of control lodged anywhere among living men? The persons or groups of persons who might conceivably authorize changes are as follows: (1) The beneficiaries; (2) the Attorney-General; (3) the legislature; (4) the donor if living or, if dead, his representatives; (5) the corporation or trustees.

In the case of a private trust, the terms may be modified if all the beneficiaries are *sui juris* and consent.[10] In the case of a non-charitable corporation the terms of the charter may be changed if all the stockholders consent, and if the state which granted the charter also consents.[11] But in the case of a charity the beneficiaries are necessarily uncertain, for it is this uncertainty in the persons to be benefited by the fulfillment of a purpose which makes the purpose charitable. The beneficiaries of a school or college include all persons now living or who may be born hereafter who are or who may be entitled to become students at the institution. Obviously, since the beneficiaries are uncertain, there is no way in which their assent to a change can be given.[12] If their assent is a *sine qua non*, no change can ever be made.

The Attorney-General is so far a representative of the beneficiaries of a charity that he may bring a proceeding to enforce charitable trusts, and he is a necessary party to proceedings involving their validity and their administration.[13] He has no authority, however, to surrender or to modify the rights of the beneficiaries. It would undoubtedly be unwise to entrust this power to a political officer who would seldom have the time or the necessary qualifications to deal with the delicate questions of policy which would be involved.

What of the power of the legislature? In England, Parliament undoubtedly enjoys, and has not infrequently exercised, the power to revise or even to extinguish charitable foundations.[14] But the

[10] See SCOTT, CASES ON TRUSTS, Chap. X. There is some dissent. See Claflin *v.* Claflin, 149 Mass. 18, 20 N. E. 454 (1889). At any rate the settlor's provisions are not binding for more than a limited time. See SCOTT, CASES ON TRUSTS, 831 n.

[11] See COOK, CORPORATIONS, 7 ed., §§ 492–500.

[12] Some of the beneficiaries may be definite, in which case they may bring suit to enforce the trust. See GRAY, RULE AGAINST PERPETUITIES, 3 ed., App. A.

[13] Strickland *v.* Weldon, 28 Ch. D. 426 (1885); GRAY, RULE AGAINST PERPETUITIES, 3 ed., p. 533 n.; TUDOR, CHARITIES, 4 ed., 376.

[14] The English statute books are full of instances of special acts remodelling old charitable foundations. See, for instance, Stat. 34 & 35 VICT. c. 117 (1871), approving

power of our legislatures is subject to constitutional limitations. A hundred years ago it was made clear by the decision in the Dartmouth College Case [15] that the federal Constitution limits the power of a state legislature to modify the provisions of the charter of a charitable corporation.

The story of Dartmouth is well known. In 1769 George III granted a charter under the public seal of the province of New Hampshire to Dartmouth College. By the terms of this charter the college was to be governed by a self-perpetuating body of twelve trustees. In 1816 the legislature of the state of New Hampshire passed a statute "to amend the charter and encourage and improve the corporation of Dartmouth College," changing the name of the corporation to Dartmouth University, increasing the number of trustees to twenty-one, giving the Governor the power to appoint the additional trustees, and creating a board of overseers to be appointed for the most part by the Governor; in brief, transferring the control of the institution to the state. This was done over the strenuous objections of the old board of trustees. An action was brought in the courts of New Hampshire to test the validity of the act of 1816.

In the masterly argument [16] by Jeremiah Mason before the Superior Court of Judicature of New Hampshire, the validity of the act was attacked on three grounds: First, it was contended that the act was not an exercise of legislative power, because in effect it attempted to authorize the taking of property from one set of trustees and the giving of it to another; that it was therefore invalid on general principles and under provisions of the state constitution as to the separation of powers.[17] Second, it was contended that it violated a provision in the state constitution that "No subject shall be . . . deprived of his property, immunities or privileges, put out of the protection of the law, exiled or de-

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a scheme as to the famous charities of Christopher Tancred. See HOBHOUSE, THE DEAD HAND, 66.

For instances of the modification of corporate charters by Parliament, see Trustees of Dartmouth College *v.* Woodward, 65 N. H. 473, 573 (1817).

For instances of general acts affecting educational endowments, see notes 6 and 7, *supra.*

[15] Trustees of Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518 (1819).

[16] *Ibid.*, 65 N. H. 473–502 (1817); FARRAR, DARTMOUTH COLLEGE CASE, 28–70.

[17] Art. 37 of the Bill of Rights.

prived of his life, liberty or estate, but by the judgment of his peers or the law of the land." [18] Third, it was contended that it violated the provision of the federal Constitution that "No State shall . . . pass any . . . law impairing the obligation of contracts." [19]

The state court overruled all these contentions, and upheld the act.[20] The case was then brought before the Supreme Court of the United States by writ of error. The only question there arguable was whether the act violated the federal Constitution. The Fourteenth Amendment with its provision that "No State shall . . . deprive any person of life, liberty or property without due process of law" was not to become a part of the organic law of the United States until more than half a century later. To overturn the act it was necessary, therefore, to bring it within the scope of the contracts clause. And this the Supreme Court proceeded to do.

Influenced no doubt by prevalent French juridical conceptions, the court held that the term "contract," within the purview of the constitutional provision, includes not merely executory obligations but also executed grants or conveyances. The charter itself constituted a grant of the privilege or franchise of being a legal entity with certain powers; a change in the charter, it was held, impaired this grant. Furthermore, property had been conveyed to Dartmouth College by the founder and by other donors prior and subsequent to the granting of the charter, for the purposes expressed in the charter; a change in the charter, it was held, impaired these grants.[21]

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[18] Art. 15 of the Bill of Rights. See also Arts. 2, 20, 23.

[19] Art. 1, § 10.

[20] 1 N. H. 111; 65 N. H. 473, 624 (1817).

[21] "From the very nature of the case, therefore, there was an implied contract on the part of the crown with every benefactor, that if he would give his money, it should be deemed a charity protected by the charter, and be administered by the corporation according to the general law of the land. As soon, then, as a donation was made to the corporation, there was an implied contract springing up, and founded on a valuable consideration, that the crown would not revoke, or alter the charter, or change its administration, without the consent of the corporation. There was also an implied contract between the corporation itself, and every benefactor upon a like consideration, that it would administer his bounty according to the terms, and for the objects stipulated in the charter." *Per* Story, J., 4 Wheat. (U. S.) 518, 689.

It had previously been held by the Supreme Court of the United States that it was an impairment of the obligation of contracts for the legislature to rescind a convey-

This reasoning sounds far-fetched to many lawyers to-day. The truth seems to be that the court was trying to make the contracts clause accomplish as far as possible the function of a "due-process" provision. If the Fourteenth Amendment had been originally written into the federal Constitution it would have been unnecessary to give to the contracts clause the wide interpretation which the court gave to it. It seems clear that the act of the New Hampshire legislature did violate the provision of the state constitution prohibiting deprivation of property contrary to the "law of the land," and that to-day it would violate the due-process clause of the Fourteenth Amendment.[22] Perhaps also it was not a proper exercise of legislative power, and violated the provisions of the state constitution as to the separation of powers.[23] It would seem

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ance of land made by it. Fletcher *v.* Peck, 6 Cranch (U. S.), 87 (1810). Or to revoke an exemption from taxation. New Jersey *v.* Wilson, 7 Cranch (U. S.), 164 (1812). Compare Terrett *v.* Taylor, 9 Cranch (U. S.), 43 (1815); Pawlet *v.* Clark, 9 Cranch (U. S.), 292 (1815).

[22] See Board of Education *v.* Bakewell, 122 Ill. 339, 10 N. E. 378 (1887); Regents of University of Maryland *v.* Williams, 9 G. & J. (Md.) 365 (1838); Ohio *v.* Neff, 52 Ohio St. 375, 40 N. E. 720 (1895); Brown *v.* Hummel, 6 Pa. 86 (1847). *Cf.* Downing *v.* Indiana State Board of Agriculture, 129 Ind. 443, 28 N. E. 123, 614 (1891); Sage *v.* Dillard, 15 B. Mon. (Ky.) 340 (1855); Webster *v.* Cambridge, Female Seminary, 78 Md. 193, 28 Atl. 25 (1893); Dow *v.* Railroad, 67 N. H. 1, 27, 36 Atl. 510 (1886). See Doe, "A New View of the Dartmouth College Case," 6 HARV. L. REV. 161, 213; JOHN MARSHALL, ed. by Dillon, vol. I. 154.

In Ohio *v.* Neff, 52 Ohio St. 375, 40 N. E. 720 (1895), *supra*, it appeared that a charter was granted to Cincinnati College in 1819 by an act of the legislature which provided that "This act shall be subject to such alterations as the general assembly may from time to time see proper to make." It was held that in view of the provision in the constitution of Ohio that "Private property shall ever be held inviolate," the legislature had no power to strip the college of its property by placing the college under the management of the University of Cincinnati. See further, as to the effect of provisions reserving to the legislature power to alter charters, Pennsylvania College Cases, 13 Wall. (U. S.) 190 (1871); Bryan *v.* Board of Education, 151 U. S. 639 (1894); Sage *v.* Dillard, 15 B. Mon. (Ky.) 340 (1855); Jackson *v.* Walsh, 75 Md. 304, 23 Atl. 778 (1892); Webster *v.* Cambridge Female Seminary, 78 Md. 193, 28 Atl. 25 (1893). And see Sinking Fund Cases, 99 U. S. 700 (1878); Zabriskie *v.* Hackensack, etc. R. R. Co., 18 N. J. Eq. 178 (1867).

[23] See Inglis *v.* Trustees of Sailors' Snug Harbor, 3 Pet. (U. S.) 99, 152 (1830); Regents of University of Maryland *v.* Williams, 9 G. & J. (Md.) 365 (1838); Brown *v.* Hummel, 6 Pa. 86 (1847). See Loan Association *v.* Topeka, 20 Wall. (U. S.) 655, 663 (1874), as to limitations on legislative power based on general principles. "No court . . . would hesitate to declare void a statute . . . which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B." See also Calder *v.* Bull, 3 Dall. (U. S.) 386 (1798).

As to the power of the legislature as *parens patriae* when the purposes of the trust

therefore that the state court was wrong in overruling Mr. Mason's second and perhaps also his first contention. But neither of these contentions presented a federal question, and neither was available in the federal court.

At any rate it has been settled law [24] since the decision in the Dartmouth College Case that the legislature of a state has no power arbitrarily and without its consent to deprive a private [25] charitable corporation of the privileges conferred upon it by its charter, by annulling the charter, by taking away its property or devoting the property to other purposes than those specified in the charter, or by interfering with the methods of control and administration therein laid down.[26] It is true that no matter who may

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fail or are illegal, see Mormon Church *v.* United States, 136 U. S. 1 (1890); Prince William School Board *v.* Stuart, 80 Va. 64 (1885).

[24] Trustees for Vincennes University *v.* Indiana, 14 How. (U. S.) 268 (1852); State *v.* Springfield Township, 6 Ind. 83 (1854); Edwards *v.* Jagers, 19 Ind. 407 (1862); City of Louisville *v.* University of Louisville, 15 B. Mon. (Ky.) 642 (1855); Montpelier Academy Trustees *v.* George, 14 La. 395 (1840); Trustees of New Gloucester School Fund *v.* Bradbury, 11 Me. 118 (1834); Norris *v.* Trustees of Abingdon Academy, 7 G. & J. (Md.) 7 (1834); Regents of University of Maryland *v.* Williams, 9 G. & J. (Md.) 365 (1838); Ohio *v.* Neff, 52 Ohio St. 375, 40 N. E. 720 (1895); Brown *v.* Hummel, 6 Pa. 86 (1847); Montpelier *v.* East Montpelier, 29 Vt. 12 (1856).

[25] "If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property . . . the subject is one in which the legislature of the State may act according to its own judgment. . . . That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny." Trustees of Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 629, 634, *per* Marshall, C. J. See also s. c., 4 Wheat. (U. S.) 668–672, 693, *per* Story, J.

In the cases cited in the preceding note, as in the Dartmouth College Case, the institution was held not to be public. *Cf.* Mt. Hope Cemetery *v.* Boston, 158 Mass. 509, 33 N. E. 695 (1893); Greenville *v.* Mason, 53 N. H. 515 (1873); Plymouth *v.* Jackson, 15 Pa. 44 (1850).

If the institution is public, the legislature has control over it. Trustees of University of Alabama *v.* Winston, 5 S. & P. (Ala.) 17 (1833); Lewis *v.* Gaillard, 61 Fla. 819, 56 So. 281 (1911). See Moscow Hardware Co. *v.* Colson, 158 Fed. 199 (C. C. Ida., 1907); Estate of Royer, 123 Cal. 614, 56 Pac. 461 (1899); Hathaway *v.* New Baltimore, 48 Mich. 251, 12 N. W. 186 (1882); Smith *v.* Westcott, 17 R. I. 366, 22 Atl. 280 (1891); Lewis *v.* Whittle, 77 Va. 415 (1883); Wambersie *v.* Orange Humane Society, 84 Va. 446, 5 S. E. 25 (1888). See 53 Am. Dec. 470; 29 L. R. A. 378; 45 L. R. A. 675; 35 L. R. A. (N. S.) 243.

[26] Furthermore it has been held that the doctrine of the Dartmouth College Case is applicable to a charitable trust administered by unincorporated trustees. The conveyance by the donor to the trustees for a charitable purpose is a "contract" which cannot be impaired by the legislature. Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E.

consent to changes in the charter, such changes are impossible without the consent of the legislature, expressed by a special act or a general law. In our law corporate existence is conferred only by the legislature, under special acts or general laws; and the extent of the corporate powers is determined by the legislature. But the legislature once having created a corporation and endowed it with certain powers may not solely of its own volition destroy the corporation or modify its powers.

But what if the founder and other benefactors should consent to the amendment of the charter? In the Dartmouth College Case and in the decisions following it, much is said of what is due to the founder and other benefactors. It is said that since they gave the property, their wishes must be respected in dealing with it. It has been held that they may institute proceedings to prevent misapplication of the property, to enforce the carrying out of the charitable purposes.[27] If the charitable purposes become impossible of accomplishment and there is no room for the application of the *cy-près* doctrine, they are perhaps entitled to receive back their property, or what remains of it; although the view that it should go to the state has some authority and a strong policy

92 (1890); Crawford *v.* Nies, 220 Mass. 61, 107 N. E. 382 (1914), 224 Mass. 474, 113 N. E. 408 (1916). See also Trustees of Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 697, *per* Story, J.; Magill *v.* Brown, Fed. Cas. No. 8952, p. 419 (1833). In Cary Library *v.* Bliss, *supra*, it was said that the rule in the Dartmouth College Case as to charters "is a mere extension of the doctrine which gives a similar effect to the written statement of a scheme that is made the foundation of donations to unincorporated trustees of a public charity."

[27] Ervien *v.* United States, 40 Sup. Ct. Rep. 75 (1919) (land granted by Congress to a state upon trust for particular purposes; injunction allowed against threatened breach of trust); Garrison *v.* Little, 75 Ill. App. 402, 417 (1897); Chambers *v.* Baptist Educational Society, 1 B. Mon. (Ky.) 215, 220 (1841); Mills *v.* Davison, 54 N. J. Eq. 659, 35 Atl. 1072 (1896); Hascall *v.* Madison University, 8 Barb. (N. Y.) 174 (1850). The Attorney-General is a necessary party. See note 13, *supra*. The donors are not necessary parties. Women's Christian Association *v.* Kansas City, 147 Mo. 103, 126, 48 S. W. 960 (1898).

The founder of an eleemosynary corporation and his heirs or anyone designated by him have authority to act as visitors of the corporation. When a body of trustees is incorporated the visitorial power is usually held to be vested in the trustees. The visitorial power, however, is a power to enforce but not to modify the purposes for which the corporation exists or for which property is given to it. As to this see Philips *v.* Bury, 2 T. R. 346, 352 (1788); Trustees of Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 562, 672; Allen *v.* McKean, 1 Sumn. (U. S. C. C.) 276 (1833); Sanderson *v.* White, 18 Pick. (Mass.) 328, 339 (1836); Mackenzie *v.* Trustees of the Presbytery, 67 N. J. Eq. 652, 61 Atl. 1027 (1904).

behind it.[28] But beyond these they have no rights. They have no power to revoke their gifts.[29] Nor may they authorize a modification of the purposes for which their gifts were made. With complete unanimity the courts have held that where property is given to a charitable corporation for the purposes declared in its charter, the trustees of the corporation may object to a change in the charter though authorized by the legislature and consented to by the founder and other benefactors. Thus where a town is the founder of a school or college, its consent is not sufficient to validate a statute modifying the charter.[30] The result is the same where the state itself is the founder and sole benefactor,[31] unless the institution is in truth a public institution, a governmental agency.[32] In most cases, moreover, it is physically impossible to obtain the consent of the donors. Frequently there are so many donors that it would be impracticable to obtain the consent of all. Usually when the question of amending the charter arises many if not all of them are dead; and whatever may be argued as to the effect of the consent of the donors themselves, the consent of their heirs or executors or next of kin or devises or legatees is of no avail.[33]

Finally, a change in the charter of a charitable corporation may be desired by the corporation itself. What is the effect of consent

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[28] GRAY, RULE AGAINST PERPETUITIES, 3 ed., §§ 44–51*a* (corporations), § 603*i* (trusts).

[29] "The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution." Trustees of Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 641 (1819), *per* Marshall, C. J. See also Langdon *v.* Plymouth Cong. Soc., 12 Conn. 113 (1837); Christ Church *v.* Trustees, 67 Conn. 554, 35 Atl. 552 (1896); St. Paul's Church *v.* A. G., 164 Mass. 188, 199, 41 N. E. 231 (1895).

[30] City of Louisville *v.* University of Louisville, 15 B. Mon. (Ky.) 642 (1855).

[31] Galveston County *v.* Tankersley, 39 Tex. 651 (1873); Grammar School *v.* Burt, 11 Vt. 632 (1839); Montpelier *v.* East Montpelier, 29 Vt. 12 (1856); Grammar School *v.* Bailey, 62 Vt. 467, 20 Atl. 820 (1889).

In Fletcher *v.* Peck, 6 Cranch (U. S.), 87 (1810), it was held that the contracts clause of the federal Constitution prevents a state from rescinding grants of land previously made by it. *Cf.* New Jersey *v.* Wilson, 7 Cranch (U. S.), 164 (1812); Terrett *v.* Taylor, 9 Cranch (U. S.), 43 (1815); Pawlet *v.* Clark, 9 Cranch (U. S.), 292 (1815).

[32] See note 25, *supra*.

[33] Trustees of Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 642 (1819); Cary Library *v.* Bliss, 151 Mass. 364, 377, 25 N. E. 92 (1890). See also A. G. *v.* Margaret and Regius Professors, 1 Vern. 55 (1682).

by the corporation expressed by vote of its board of trustees?[34] On this question the Supreme Court of the United States has not passed. The state decisions are in conflict.[35] Those decisions in which it is held that no change may be made even with the consent of the trustees, argue that to allow a change would be a breach of faith to the donors. And yet, as we have seen, it is agreed that the consent of the donors will not justify changes. Is it not a bit absurd to hold that the subsequent wishes of the donors are to be entirely disregarded and yet to contend that the expression of their wishes at the time they made their gifts are to be treated like the laws of the Medes and Persians? "Under the guise of

[34] Informal assent or acquiescence by individual trustees is not effective. Allen *v.* McKean, 1 Sumn. (U. S.) 276 (1833); Board of Education *v.* Bakewell, 122 Ill. 339, 10 N. E. 378 (1887); Case of St. Mary's Church, 7 S. & R. (Pa.) 517 (1822). See Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E. 92 (1890).

[35] In the following cases it was held that the charter of a charitable corporation may be amended with the consent of the board of trustees: Pennsylvania College Cases, 13 Wall. (U. S.) 190, 218 (1871) (*semble*); Regents of University of Maryland *v.* Williams, 9 G. & J. (Md.) 365 (1838) (*semble*); Visitors, etc. of St. John's College *v.* Purnell, 23 Md. 629 (1865); Jackson *v.* Walsh, 75 Md. 304, 23 Atl. 778 (1892); Case of St. Mary's Church, 7 S. & R. (Pa.) 517 (1822) (*semble*); *Ex parte* The Greenville Academies, 7 Rich. Eq. (S. C.) 471 (1854) (*semble*). See Bryan *v.* Board of Education, 151 U. S. 639 (1894); People *v.* College of California, 38 Cal. 166 (1869); Sage *v.* Dillard, 15 B. Mon. (Ky.) 340 (1855); Central University *v.* Walters' Exrs., 122 Ky. 65, 90 S. W. 1066 (1906).

The opposite result was reached in Allen *v.* McKean, 1 Sumn. (U. S. C. C.) 276 (1833) (*semble*); Board of Education *v.* Bakewell, 122 Ill. 339, 10 N. E. 378 (1887) (*semble*); State *v.* Adams, 44 Mo. 570 (1869); Thiel College's Appeal, 216 Pa. 630, 66 Atl. 83 (1907). And see Cary Library *v.* Bliss, 151 Mass. 364, 25 N. E. 92 (1890); Crawford *v.* Nies, 220 Mass. 61, 107 N. E. 382 (1914), 224 Mass. 474, 113 N. E. 408 (1916). But *cf.* Ware *v.* Fitchburg, 200 Mass. 61, 85 N. E. 951 (1908).

If land is given to a charitable corporation or to trustees for charitable purposes, with a direction that the land shall be forever used for these purposes, it has been held that a court of equity (SCOTT, CASES ON TRUSTS, 356), or the legislature as *parens patriae*, may authorize a sale of the lands, when, in view of changing circumstances, the ultimate purposes of the donor would be more effectively promoted by their sale than by their retention. See Stanley *v.* Colt, 5 Wall. (U. S.) 119 (1866); Sohier *v.* Trinity Church, 109 Mass. 1 (1871); Van Horne, Petitioner, 18 R. I. 389, 28 Atl. 341 (1893). And see Trustees Baptist Church *v.* Laird, 10 Del. Ch. 118, 85 Atl. 1082 (1913) (conversion not expressly forbidden by donor). But see *contra* Tharp *v.* Fleming, 1 Houst. (Del.) 580 (1858). In Connecticut it is held that owing to the provisions in the state constitution as to separation of powers, the legislature may not, although the courts may, authorize a sale of such property. Bridgeport Public Library *v.* Burroughs Home, 85 Conn. 309, 82 Atl. 582 (1912). As to the power of the legislature as *parens patriae* to authorize the sale of property of persons under a disability, such as infants, lunatics, etc., see COOLEY, CONSTITUTIONAL LIMITATIONS, 6 ed., 115; 16 L. R. A. 251; 8 L. R. A. (N. S.) 62.

fulfilling a bequest," said John Stuart Mill,[36] "this is making a dead man's intentions for a single day a rule for subsequent centuries, when we know not whether he himself would have made it a rule even for the morrow. . . . No reasonable man, who gave his money, when living, for the benefit of the community, would have desired that his mode of benefiting the community should be adhered to when a better could be found." It must not be overlooked that a too meticulous adherence to the words of the donor often means the defeat and not the accomplishment of his ultimate purpose. He intended to make his property useful to mankind. To render it useless is to defeat his intention.

Some vain and obstinate donors indeed might prefer to have their own way forever, whether that way should ultimately prove beneficial or not. But why should effect be given to such an unreasonable desire? A man is not allowed to control the disposition of property for private purposes beyond the period of perpetuities. The Rule against Perpetuities is inapplicable to charities only because the public interest is supposed to be promoted by the creation of charities. The public interest is not promoted by the creation of a charity which by the lapse of time ceases to be useful. The founder of a charity should understand therefore that he cannot create a charity which shall be forever exempt from modification. This idea is expressed by the Commissioners on Popular Education in England, who said:

"It seems, indeed, desirable in the interest of charities in general, and of educational charities in particular, that it should be clearly laid down as a principle, that the power to create permanent institutions is granted, and can be granted, only on the condition implied, if not declared, that they be subject to such modifications as every succeeding generation shall find requisite." [37]

It may be suggested that unless donors can rely upon the strict observance of all their directions they will be dissuaded from making gifts for charitable purposes. But experience in England shows the fact to be otherwise. Charitable gifts were never more common in England than in the early days of the Reformation, when the fact that Henry VIII had defeated the intentions of many a founder of religious institutions was fresh in the minds of every English-

[36] 1 DISSERTATIONS, pp. 32, 36.

[37] 1 REPORT OF COMMISSION ON POPULAR EDUCATION, 1861, p. 477.

man. Bequests to the English universities actually increased after Parliament had authorized them to depart from the directions of their founders and benefactors.[38] It would seem rather that the charitably minded would be discouraged by the sight of charitable institutions gradually ceasing to accomplish the high purposes for which they were created.

All this is clearly recognized in the better-reasoned decisions. Institutions must change, and there must be a power to authorize changes. In *Central University of Kentucky* v. *Walters' Executors* [39] the court said:

"The very nature of the enterprise, on the contrary, looked to improvement. It contemplated, by every reasonable implication, that new methods, new people, even new ideas, would be employed, when approved by the governing body of the institution. A college means, or ought to mean, growth; the elimination of the false; the fostering of the true. As it is expected to be perpetual in its service, it must conform to the changed condition of each new generation, possessing an elasticity of scope and work commensurate with the changing requirements of the times which it serves. For the past to bind it to unchangeableness would be to prevent growth, applying the treatment to the head that the Chinese do to the feet."

In the *Case of St. Mary's Church*,[40] Gibson, J., said:[41]

"The power of assenting to amendments must rest somewhere; and it can, nowhere, be so conveniently or safely deposited as with the trustees, under the controlling influence of the congregation, exercised through the medium of an election."

And referring to the Dartmouth College Case, he said:[42]

"All that was decided there was, that the college should not undergo a violent transformation at the mere will of the Legislature; but it was not supposed by anyone, that if the assent of the corporation had been procured, the Act of Assembly would have been unconstitutional."

In this case it appeared that the corporation (created to hold and manage the temporalities of a church) consisted under its original charter of eight lay and three clerical trustees, and that at

[38] 4 REPORT OF COMMISSION ON POPULAR EDUCATION, 1861, p. 308.
[39] 122 Ky. 65, 83, 90 S. W. 1066 (1906).
[40] 7 S. & R. (Pa.) 517 (1822).
[41] P. 541.
[42] P. 547.

a meeting of the board of trustees it was voted (the lay trustees all concurring, the clerical trustees dissenting [43]) to amend the charter so that the board should consist of eleven lay trustees. The amendment was held to be invalid. Tilghman, C. J., said: [44]

"I grant, that if the clergy had consented; if even a majority of the clerical trustees had consented, there would be no good objection to the alteration. Because, although the charter does not provide for it, yet, in the nature of things, it must be supposed that all human institutions may in the course of time require alteration. And when the question for alteration comes on, there is no rule so convenient as to decide by a majority. . . . I agree therefore, that in corporations where there is no distinction of classes, a majority of the whole corporation would be sufficient. But where there are different classes, the majority of each class should consent, before the charter can be altered."

This limitation upon the authority of the majority seems sound. Similarly, when the acts of the trustees are subject to the supervision and control of another body, *e. g.*, a church conference or synod, amendments should be allowed only with the consent of the supervising body.[45]

Apparently the fear lurking in the hearts of those who would compel the observance of the directions of donors in their minutest details is that a failure to observe these directions might lead to the overthrow of charitable trusts, and ultimately perhaps of the institution of private property; that no clear line can be drawn between a departure from the letter of the donor's directions, and confiscation.[46] It is true that the line is not a clear one, that the difference is in the last analysis a difference in degree. That is true of practically all differences in the law; in their final analysis they are distinctions in degree.[47] The difference between what is

[43] One of the clerical trustees was improperly excluded from the meeting. This of itself was a sufficient ground in the opinion of the court for vitiating the proceedings at the meeting.

[44] Page 537.

[45] See Liggett *v.* Ladd, 17 Ore. 89, 21 Pac. 133 (1888).

[46] "If the original trust, in all its requirements, is not obligatory, where shall the line be drawn? And what is to hinder a total perversion of the fund? If a change can be made so material as one affecting the choice of curators, I can see no limit." State *v.* Adams, 44 Mo. 570, 580 (1869). See also Brown *v.* Hummel, 6 Pa. 86, 94–95 (1847).

[47] "I have heard it suggested that the difference is one of degree. I am the last man in the world to quarrel with a distinction simply because it is one of degree. Most distinctions, in my opinion, are of that sort, and are none the worse for it." Holmes, J., in Haddock *v.* Haddock, 201 U. S. 562, 631 (1906).

reasonable and what is unreasonable, between what is right and what is wrong, is often but a distinction in degree. To refuse to allow what is reasonable and what is right, because of aversion to what is unreasonable and what is wrong, is to deny all progress.

I would not contend that absolute power should be given to the trustees to divert charity funds to any charitable purpose they may select. Regularly they have the power and the duty of administering the property for the purposes for which it was given. Even where the purposes become impossible of accomplishment, they have no authority to proceed to apply the property to any other purposes. Such application may in that case be authorized by the courts, but may not be made by the trustees without such authorization.[48] I would contend, however, that even if the precise purposes for which the property was given are not actually impossible of accomplishment, even if changes are not imperatively demanded, yet if the trustees consent to certain changes, and the court is of the opinion that such changes are not unreasonable in view of the general purposes of the donors and of the changes that time has brought to pass, in view, in short, of all the circumstances, the court should authorize such changes.[49] I contend, in other words, that the consent of the trustees is a most important factor in determining what changes are justifiable. The trustees are peculiarly fit to determine such questions. They hold and administer the property; they and they alone represent both the donors and the beneficiaries.[50]

In the case of property held by a charitable corporation, the desired changes may require an amendment of the corporate charter. In that case I would contend that if the trustees consent to an act

[48] Lakatong Lodge *v.* Franklin Board of Education, 84 N. J. Eq. 112, 92 Atl. 870 (1915).

[49] "The necessity that will authorize and warrant an order from the court deviating from the exact plan as indicated by the will of the donor, need however be only a reasonable necessity and not an absolute physical impossibility." Women's Christian Association *v.* Kansas City, 147 Mo. 103, 127, 48 S. W. 855 (1898).

[50] "Their [the donors'] descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also." Trustees of Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 642 (1819), *per* Marshall, C. J.

of the legislature authorizing such an amendment, the act should not be held unconstitutional if it is not so unreasonable as to subvert the general purposes for which the corporation was founded or for which its funds were given. The decision in the Dartmouth College Case is not opposed to this view. Counsel for Dartmouth College admitted that the act of the legislature would have been valid if the trustees of the college had consented to it; the Supreme Court placed its decision on the ground of the lack of such consent. It is submitted that if the trustees had consented there would have been no impairment of the obligation of contracts, no arbitrary taking of property without due process of law or contrary to the law of the land, no exercise by the legislature of judicial power.

As a matter of fact the charters of our older colleges have been amended over and over again at the request of their trustees.[51] Harvard University is governed by a Board of Overseers selected in a manner quite different from that provided for in its original charter.[52] In many of the colleges religious requirements as to governing bodies and officers of instruction have been changed. Usually no question has been raised as to the validity of these changes. Surely they are not all in violation of the Constitution of the United States or of the state constitutions. And even when such changes have not been made, the requirements have often been evaded, particularly requirements as to the beliefs in certain religious dogmas; and such evasions have been winked at. It is encouraging hypocrisy to say that the requirements may be successfully evaded but cannot be openly changed.

A few years ago the question of amending the charter of Brown University was agitated. This charter requires that there should be thirty-six trustees, of whom twenty-two should be Baptists; five, Quakers; four, Congregationlists; and five, Episcopalians. A committee, composed of three eminent lawyers, Stephen O. Edwards, Charles E. Hughes, and Everett Colby, reported that an amendment of the charter abolishing these religious requirements would probably be held unconstitutional, although consented to

[51] See FINAL REPORT OF THE COMMITTEE APPOINTED TO CONSIDER POSSIBLE CHANGES IN THE CHARTER OF BROWN UNIVERSITY (1910), 55–58.

[52] For the changes which have been made in the charter, see the annual OFFICIAL REGISTER OF HARVARD UNIVERSITY. See also SHIRLEY, THE DARTMOUTH COLLEGE CAUSES, 167–174.

by the corporation.[53] It is submitted that such a holding is not demanded by the decision in the Dartmouth College Case, that it would be opposed to the weight of authority in the state decisions, and that it would eventually create an intolerable situation. Lord Eldon's reactionary views as to the English grammar schools did little harm, for Parliament soon swept away the dam which Lord Eldon raised to stem the current of educational reform. But in this country there would be no such way of escape. Why put this unnecessary strain upon our constitutional guaranties? The evils would become more pronounced as generation succeeded generation, until finally the courts would be driven to say that the Constitution does not preclude relief. Sooner or later this view must prevail, unless progress is to be stayed by a view which surrenders the welfare of the living to the fancied wishes of the dead.

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[53] See FINAL REPORT OF THE COMMITTEE APPOINTED TO CONSIDER POSSIBLE CHANGES IN THE CHARTER OF BROWN UNIVERSITY (1910), 36–58.